

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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SAMUEL O.,

Plaintiff,  
v.

Civil Action No.  
5:21-CV-1057 (DEP)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF  
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STEVEN R. DOLSON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
625 JFK Building  
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NATASHA OELTJEN, ESQ.

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g) are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on October 5, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not

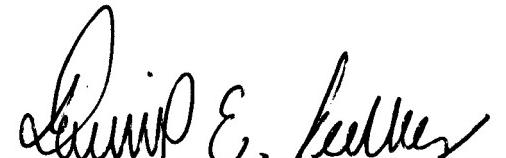
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles  
David E. Peebles  
U.S. Magistrate Judge

Dated: October 6, 2022  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
SAMUEL O.,

Plaintiff,

vs.

5:21-CV-1057

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----x  
Transcript of a **Decision** held during a  
Telephone Conference on October 5, 2022, the  
HONORABLE DAVID E. PEEBLES, United States  
Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: Let me begin by thanking counsel. This is an interesting issue and I've enjoyed working with both of you.

Plaintiff has commenced this proceeding pursuant to  
42 United States Code Section 405(g) to challenge an adverse  
determination by the Commissioner of Social Security finding  
that he was not disabled at the relevant times and therefore  
ineligible for the Disability Insurance benefits which he  
sought.

The background is as follows -- I won't go into a great deal of detail concerning the background since the nature of the plaintiff's argument really focuses on step five of the sequential analysis. Nonetheless I'll give some background. Plaintiff is 65 years of age, he was born in February of 1957, he was 62 at the alleged onset of his disability on March 4, 2019. He lives in Liverpool with a wife in a single-level house. He has a high school education. Plaintiff drives. He worked in a composite position as auto sales manager and in auto sales for two dealerships, one for 13 years, one for 22 years. He left in January of 2019, although there was a failed work attempt beginning in May of 2019 and ending somewhere between August and October, the record is somewhat ambiguous on that score.

1                   The plaintiff suffers from heart issues, had  
2 prostate cancer surgery in June of 2020, he has urinary  
3 incontinence issues that are residuals from that surgery. He  
4 has Non-Hodgkin's lymphoma although it is in remission, and  
5 he is obese, he includes that he has breathing issues.

6                   Mentally, plaintiff suffers from mild depression.  
7 He is on medication and it appears to be helping.

8                   In terms of activities of daily living, plaintiff  
9 does some cooking, watches television, plays with his  
10 grandchildren, does some yardwork, tries to vacuum, he  
11 showers, grooms, can dress, and socializes, including  
12 occasional trips to a casino.

13                  Procedurally, plaintiff applied for Title II  
14 benefits under the Social Security Act on October 4, 2019,  
15 again, alleging an onset date of March 4, 2019, and claiming  
16 disability based on various heart conditions, hyperlipidemia,  
17 hypertension, hypercholesterolemia, Non-Hodgkin's lymphoma in  
18 remission. A hearing was conducted with a vocational expert  
19 by Administrative Law Judge Michelle Marcus on December 1,  
20 2020. The ALJ issued an unfavorable decision on December 23,  
21 2020. The Social Security Administration Appeals Council  
22 denied plaintiff's application for review on July 29, 2021.  
23 This action was commenced on September 23, 2021, and is  
24 timely.

25                  In his position -- in her decision, ALJ Marcus

1 applied the five-step sequential test for determining  
2 disability.

3 At step one, she concluded that plaintiff had not  
4 engaged in substantial gainful activity since the alleged  
5 onset date and characterized the subsequent work as an  
6 unsuccessful work attempt.

7 At step two she found that plaintiff suffers from  
8 severe impairments including coronary artery disease,  
9 premature ventricular contractions, or PVC, prostate cancer,  
10 now status post prostatectomy. She rejected some other  
11 claimed conditions, including atrial fibrillation, as  
12 nonsevere.

13 At step three, the administrative law judge  
14 concluded plaintiff's conditions do not meet or medically  
15 equal any of the listed presumptively disabling conditions,  
16 specifically considering Listings 4.04, 4.05, and 13.24.

17 In terms of residual functional capacity,  
18 Administrative Law Judge Marcus concluded that plaintiff is  
19 capable of performing sedentary work with additional  
20 limitations.

21 The step four finding by Michelle Marcus was that  
22 plaintiff is incapable of performing his past relevant work  
23 which was characterized as a composite position of sales  
24 manager and auto salesperson. It was noted by the  
25 administrative law judge that in her view plaintiff could

1 perform the sales manager position but exertional  
2 requirements of the salesperson position precluded that work.

3 At step five, the vocational expert testified that  
4 plaintiff did possess transferable skills from the sales  
5 manager position and could work as a sales manager, citing a  
6 number of jobs available in the national economy, and  
7 therefore concluded that plaintiff was not disabled at the  
8 relevant times.

9 The court's function in this case is to determine  
10 whether correct legal principles were applied and the  
11 resulting determination is supported by substantial evidence.

12 The sole issue raised by the plaintiff concerns the  
13 administrative law judge's step five finding, arguing that  
14 the administrative law judge was required to, but did not,  
15 make findings specific concerning transferability of skills.  
16 As a backdrop I note that at step five, it is the  
17 Commissioner's burden to establish the availability of work  
18 in the national economy that plaintiff is capable of  
19 performing notwithstanding his limitations. Both parties  
20 agree that because plaintiff is over 55 and limited to  
21 sedentary work, the issue of whether he possesses  
22 transferable skills is dispositive. If he does not, then a  
23 finding of disability is warranted under Rule 201.06. If  
24 there are transferable skills, a finding of not disabled is  
25 directed by Grid Rule 201.07.

1                   The term skill is defined under SSR 82-41 from 1982  
2 as follows: A skill is knowledge of a work activity which  
3 requires the exercise of significant judgment that goes  
4 beyond the carrying out of simple job duties and is acquired  
5 through performance of an occupation which is above the  
6 unskilled level, meaning it requires more than 30 days to  
7 learn. It is practical and familiar knowledge of the  
8 principles and processes of an art, science, or trade,  
9 combined with the ability to apply them in practice in a  
10 proper and approved manner.

11                  The SSR goes on to note that to find that an  
12 individual who is age 55 or over and is limited to sedentary  
13 work exertion has skills transferable to sedentary positions,  
14 there must be very little, if any, vocational adjustment  
15 required in terms of tools, work processes, work settings, or  
16 the industry.

17                  The law is fairly clear that, at least in this  
18 circuit, that an ALJ must make findings and include in his or  
19 her written decision findings concerning the transferability  
20 in issue. The reasoning must be clear and permit adequate  
21 judicial review.

22                  As I think both parties have noted, there is a  
23 distinction between an aptitude and a skill. And that is  
24 noted in the Second Circuit's decision in *Draegert v.*  
25 *Barnhart*, 311 F.3d 468 from 2002, as well as the decision

1 from my colleague Magistrate Judge Daniel J. Stewart in *June*  
2 *S. v. Commissioner of Social Security*, found at 2018 WL  
3 3626423 from the Northern District of New York, July 27,  
4 2018. And the issue I think is really brought into focus and  
5 particularly critical because we're dealing with a composite  
6 job, as plaintiff's counsel has argued. The administrative  
7 law judge did not make any findings in her decision  
8 concerning transferability. Her discussion of  
9 transferability is limited on page 45 to the following:  
10 "Ms. Spaulding testified," that's the vocational expert,  
11 "that the claimant had transferable skills from the sales  
12 manager portion of his past composite occupation. She noted  
13 that the residual functional capacity would allow performance  
14 of all demands of this title and likewise all of the  
15 transferable skills therein. Thus, I find the claimant has  
16 transferable skills within the scope of the claimant's  
17 residual functional capacity." There is no identification of  
18 what those skills are.

19 I understand that in certain circumstances a  
20 vocational expert can rely on -- I'm sorry, an administrative  
21 law judge can rely on vocational expert testimony provided  
22 that he or she makes findings. *Clark v. Berryhill*, 697  
23 F.App'x 49 from the Second Circuit, September 8, 2017, and  
24 it's also noted in Judge Stewart's decision in *June S.* which  
25 I just gave the citation to.

1           In this case, however, the administrative law judge  
2 did not identify the skills during the course of her  
3 testimony. At page 90, the question is posed, "Are there  
4 transferable skills from what he, the claimant's past job,  
5 that would transfer to this job, that would require very  
6 little, if any, vocational adjustment in terms of tools, work  
7 processes, work setting, or the industry?

8           "Answer: So, yes, that work as a sales manager  
9 could be performed."

10          There is no discussion as to what skills the  
11 vocational expert is referring to. Is the error harmful?  
12 Yes. It precludes meaningful review. The vocational expert  
13 identified 189,000 jobs in the national economy that extend  
14 into other industries besides automobile sales. I am unable  
15 to determine whether transferable skills translate into those  
16 other settings and what degree of vocational adjustment, if  
17 any, would be required. I looked at the Dictionary of  
18 Occupational Titles for the position manager, sales, DOT  
19 163.167-018, and I was unable to determine what skills  
20 plaintiff possesses that would allow him to perform that job  
21 in other industries without significant vocational  
22 adjustment.

23          I am unable to say that the determination at step  
24 five is supported by substantial evidence and that correct  
25 legal principles were applied because I believe the

1 administrative law judge ran afoul of the court's directive  
2 in *Clark and Draegert*.

3 I do note that the Commissioner cited *Carol Ann T.*  
4 *v. Commissioner of Social Security*, 2021 WL 3165353 from the  
5 Northern District of New York July 26, 2021, but that case is  
6 distinguishable because the administrative law judge made  
7 findings, in such job, plaintiff would possess certain  
8 clerical skills including data entry, keyboarding, filing,  
9 record keeping, information giving, and processing requests  
10 for information. No such finding by the administrative law  
11 judge was made in this case.

12 So I conclude that there is error. I do not  
13 find -- I agree with Commissioner's counsel that I should not  
14 enter a directed finding of disability. I think the case  
15 should be remanded for compliance with *Clark* and SSR 82-41.  
16 So I will grant judgment on the pleadings to the plaintiff  
17 without directed finding and remand the matter for further  
18 consideration.

19 Thank you both for excellent presentations, have a  
20 good day.

21 MR. DOLSON: Thank you, Judge.

22 (Proceedings Adjourned, 11:25 a.m.)

23

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1 CERTIFICATE OF OFFICIAL REPORTER  
2  
3

4 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
5 Official Realtime Court Reporter, in and for the  
6 United States District Court for the Northern  
7 District of New York, DO HEREBY CERTIFY that  
8 pursuant to Section 753, Title 28, United States  
9 Code, that the foregoing is a true and correct  
10 transcript of the stenographically reported  
11 proceedings held in the above-entitled matter and  
12 that the transcript page format is in conformance  
13 with the regulations of the Judicial Conference of  
14 the United States.

15

16 Dated this 5th day of October, 2022.  
17  
18

19 /S/ JODI L. HIBBARD  
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21

22 JODI L. HIBBARD, RPR, CRR, CSR  
23 Official U.S. Court Reporter  
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